

Vaezmousavi (Migration) [2017] AATA 2113 (26 October 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Seyed Ali Vaezmousavi

CASE NUMBER: 1617661

DIBP REFERENCE(S): CLF2013/213859

MEMBER: Russell Matheson

DATE: 26 October 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 and cl.820.221 of Schedule 2 to the Regulations; and
- r.2.03A.

Statement made on 26 October 2017 at 8:20am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – De facto partner of the sponsor – Shared financial resources – Plans for family and business – Companionship and emotional support – Registered relationship

LEGISLATION

1. *Acts Interpretation (Registered Relationships) Regulations 2008*, r 2.03A
 2. *Migration Act 1958*, ss 5CB, 65
- Migration Regulations 1994*, Schedule 2 cls 820.211, 820.221, r 1.09A
- New South Wales Births Deaths And Marriages Registration Act 1995*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision of a delegate of the Minister for Immigration on 12 October 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant is a 27 year old national of Iran. He applied for the visa on 30 August 2013 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied that the applicant was the de facto partner of the sponsor. The applicant seeks review of the delegate's decision.
6. The applicant appeared before the Tribunal on 17 October 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor.
7. The applicant was represented in relation to the review by his registered migration agent.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the applicant is the de facto partner of the sponsor as defined in s.5CB of the Act.
10. The Tribunal has before it the Departments file relating to the applicant; its own file; and a copy of the Department's decision provided by the applicant (review applicant) to the Tribunal.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

11. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen...

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

12. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

13. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

14. The Tribunal has considered the documentary evidence submitted with the application and the considerable amount of additional documentary evidence that has been submitted to the Tribunal. The Tribunal has also had the benefit of the applicant's and the sponsor's oral evidence. The Tribunal found the applicant and the sponsor to be credible witnesses who presented detailed and consistent evidence during the hearing.

15. Financial aspects

16. The Tribunal considered the financial aspects of the relationship. The parties stated that they have their own personal accounts and their individual pays are deposited into those accounts. Further stating that they have a shared account and direct debits are withdrawn from that account to pay the household bills and their health insurance. The parties provided evidence of a term deposit in both names and stated that they were saving to purchase their own property. Further stating that they wished to start a retail business together and have made preliminary enquires in relation to acquiring a pre-approved loan to finance their business venture together. The applicant stated that the couple live in a shared arrangement and he pays the rent from his personal account and is reimbursed by the other tenants. The parties informed the Tribunal that the sponsor has approximately twenty thousand dollars in her personal account and that she is sponsoring the applicant's sister's visit to Australia next year. The parties said they share the daily living expenses. The parties said that they have no joint liabilities and no major assets together. The Tribunal is satisfied the parties are prepared to pool and share their financial resources.

17. Nature of the household

18. The Tribunal has considered the nature of the household. The couple gave detailed and consistent evidence about their living arrangements and daily routines and the Tribunal is satisfied that they live together. The applicant and the sponsor spoke about sharing the household duties and responsibilities in detail and the caring of their adopted Staffordshire dog. They provided consistent evidence of their living and rental arrangements and details about their daily activities and employment. The parties provided additional documentary evidence in joint names and they have advised government authorities about their de facto relationship. Tribunal accepts the parties live together and that they have established a joint household together. The Tribunal is satisfied that they share the household duties and responsibilities.

19. Social aspects

20. The Tribunal has considered the social aspects of the relationship. There are statements from third parties attesting to their belief that the relationship is a genuine one. There is photographic evidence of the couple's social activities with family and friends. The parties stated they like to go to the beach, dine out with friends and travel together. The Tribunal accepts the applicant and the sponsor plan and undertake social activities and travel together. The Tribunal is satisfied that the parties represent themselves to family and friends as being partners in a de facto relationship. The Tribunal is satisfied that friends and relatives view the relationship as a genuine and committed one.

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23. Commitment

24. The parties stated that they first met through mutual friend while attending Wollongong University together at the beginning of 2011. They stated that they have been in a committed relationship since April 2012 when they started living together. The parties registered their relationship in the state of New South Wales on 21 January 2015. To date, the relationship has lasted for a period exceeding six years.
25. The parties stated that once they have established themselves and have financial security they wish to marry and have children, further stating they are prepared to adopt a child as well. They told the Tribunal about their future plans to save and purchase their own home and start a retail clothing business together.
26. The Tribunal acknowledges that the parties have a close relationship with each other's family. The parties spoke openly about the care and support that they offer each other during times of crisis and family mourning. The parties informed the Tribunal that the sponsor had cared and supported the applicant during times of despair and depression. The Tribunal is satisfied that the parties provide each other with companionship and emotional support.
27. The Tribunal is satisfied the applicant and the sponsor provide each other a strong degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long term one.
28. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing and that they do not live separately and apart on a permanent basis.
29. The Tribunal notes that the applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests and expectations. The Tribunal is satisfied the parties provided each other a strong degree of companionship and emotional support that is commensurate with a couple being partners in a de facto relationship.

30. Findings

31. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and the time of this decision.
32. The Tribunal is satisfied that the sponsor is not prohibited from being a sponsoring partner and continues to sponsor the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision was an Australian citizen who had turned 18.
33. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221(1)(a).

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

34. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
35. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not

apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.

36. The applicant has provided evidence that the relationship is registered under the Births Deaths And Marriages Registration Act 1995 and was registered in the state of New South Wales on 21 January 2015 as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). Accordingly, the 12 month requirement does not apply.
37. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
38. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

39. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211 and cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A.

Russell Matheson
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).